

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 15-11

IGOR OVCHINNIKOV, ET AL

v.

MICHAEL HITRINOV ET AL

RESPONDENTS' RESPONSE TO
COMPLAINANTS' MOTION FOR ADMONISHMENT

ORIGINAL

CC:OS
OCC
MSG
RUB

FILED

MAY 13 2016

Federal Maritime Commission
Office of the Secretary

Pursuant to Rules 69 and 71, Specially-Appearing Respondents reply to Complainants' motion requesting that Respondents be admonished and prohibited from filing perfectly appropriate motions, upon pain of sanctions. As shown below, Complainants provide absolutely no support, legal or otherwise, for this repetitive motion.

On May 10, Complainants filed what purports to be a "Brief" in opposition to Respondents' motion to bring the Presiding Officer up to date on relevant matters that occurred *after* they filed their Response to the Order to Show Cause. Apart from the same type of invective and *ad hominem* attacks that the Presiding Officer previously asked to be toned down, Complainants for the third time embedded in their "brief" a request for action by the Presiding Officer. Also for the third time, they made their motion with absolutely no attempt to confer with opposing counsel. And for the second time they requested sanctions against Respondents and/or their counsel. As previously explained, such a request for relief is a "motion" under the FMC's Rules (as would seem universally true under the rules of the federal courts and other tribunals), to which Respondents have a right to reply.

Complainants' motion is entirely devoid of any reference to, much less analysis of, any Commission Rule alleged to be violated. That alone is sufficient grounds to deny relief. We go on, however, to show that nothing asserted in Complainants, "brief" could possibly serve as grounds for relief. For purposes of good order, we address Complainants' assertions in the sequence that they appear in Complainants' filing.

1 Complainants assert that Respondents filing was "a second motion by Respondents to enlarge their time within which to file a Response to the Commission's Notice of Default and Order to Show Cause." Leaving aside Complainants' continued confusion as to the different adjudicatory levels at the FMC, and odd analogies to the mastication of fruit, this clearly mis-states the nature of the motion. Respondents have not attempted in any way to "extend" the time to file their Response. That document was filed on May 4, and so cannot conceivably be extended. All Respondents did was bring to the attention of the Presiding Officer a relevant development that occurred *after* May 4 – statements made by Counsel for Complainants in open court to the effect that pleadings they sent to Respondents had been returned, which seem quite possibly to be the motions for default in this case. Such updates on new developments are simply routine procedure, and might well have been done by status report rather than motion (see May 11, 2016 Status Report of Respondents in *Cargo Agents, Inc. et al v NYK et al.*, FMC Docket No 16-01). The undersigned concluded conservatively that because there was some suggestion regarding the import of the development, it was more appropriate to report it by motion.

2 Complainants next suggest that there was something amiss about submitting the Affirmation of Jon Werner, regular counsel to Respondents. This quibble reflects a remarkable reversal of position in just a few hours. At 6 04 p.m., hours after Mr Werner's Affirmation had

been filed (at 3 09 p.m.), Complainants caviled that “[c]onspicuously absent from Respondents’ motion is any Affidavit from one with personal knowledge.” At 8.24 p.m., Complainants filed their next response, now complaining about Respondents submitting just what Complainants previously claimed necessary

Complainants then jump from one fallacious argument to another, asserting that Mr Werner’s Affirmation violates a confidentiality provision in an agreement from the federal *Baltic* case, and that accordingly they cannot respond on the facts. Any such claim is ludicrous on its face, given that Complainants themselves identify that the returned mail and Post Office investigation are unrelated to *Baltic*. Complainants have reaffirmed that in correspondence found in Attachments A, stating (a) “said postal investigation does not, upon information and belief, relate to *Baltic* in any way, shape, form, or manner,” and (b) “you are advised that said postal investigation does not involve, nor is said investigation related to[,] *Baltic* Auto Shipping Inc.”¹

Complainants’ evasive refusal to state frankly whether the returned pleadings were or were not the motions for default in this matter speaks volumes, and simply magnifies the propriety and relevance of the issue raised by Respondents. Complainants’ Counsel have expressly stated that the returned copies were not from the *Baltic* matter, which makes the universe of potential returned service copies fairly small, especially in light of the suggested time frame. In this circumstance, it appears quite appropriate to bring the facts to the attention of the Presiding Officer with the suggestion that he may want to enquire further to determine (1)

¹ Such admission also puts paid Complainants’ odd suggestion that there may not even be such an investigation. Finally, Counsel for Complainants has asserted falsely, in the letter to Mr Werner within Attachment A, that the *Baltic* matter is discontinued. There has been no order of discontinuation, and indeed Complainants’ Counsel continues to file pleadings in that matter

whether Respondents did or did not receive actual notice of the default motions, and (2) if so, why Counsel for Complainants failed to bring the returned documents to the attention of the Presiding Officer, rather than allowing the Presiding Officer to continue believing that they had in fact been received by Respondents.

Finally, and of even less consequence, Complainants mount an evidentiary attack on the Affirmation, calling it “rank hearsay” that should not have been said to the Presiding Officer. Apart from the facts that (i) hearsay is admissible in FMC and other administrative adjudications, and may even form the sole basis for decision,² and (ii) Mr. Werner’s Affirmation on personal knowledge from being present when Complainants’ Counsel made the statements is not hearsay at all, much less “rank” hearsay,³ this is not an evidentiary hearing where such rules might bear some relevance. Complainants have merely brought the statements to the attention of the Presiding Officer so that he may consider further inquiry, not so that he can make findings of fact.

² See, e.g., *Envirex Inc v COSCO*, 26 SRR 813, 818 n.7 (FMC 1993) (“Both the Administrative Procedure Act and the Commission’s Rules of Practice and Procedure permit the admission of hearsay evidence so long as it is relevant, material, reliable and probative”) (internal citations omitted), *EuroUSA, Inc – Possible Violations of Section 10*, 31 SRR 540,547 (FMC 2008), *United States v Anderson*, 799 F Supp 1198, 1202 (CIT 1992), *United States v FMC* 655 F.2d 247, 253-54 (D C Cir 1980) (finding of violation may be based wholly on hearsay and indirect evidence)

³ Counsel’s statements are not being used for the truth of the matter asserted, but rather to show that Counsel has raised an issue worthy of inquiry. Whether Counsel were truthful or prevaricating when they made these assertions is irrelevant. In any event, such admissions by a party are exempt from the hearsay rule. See, e.g., *PANYNJ v NYSA*, 22 SRR 1217, 1219 (ID 1984), affirmed, 23 SRR 21 (FMC 1985). Complainants have proffered no standards for separating “rank” hearsay from ordinary hearsay, but that is inconsequential, as the standards in FMC proceedings look to other criteria, such as materiality and reliability. See n.2, above. It is clearly material whether Complainants kept the Presiding Officer in the dark about the status of their purported service. And it is hard to imagine anything other than a transcript being more probative than the affirmation of an officer of the court who was personally present and directly heard the statements.

Accordingly, Respondents' submission of the Werner Affirmation is no basis for admonishment.

3 Finally, Complainants train their attention on the undeniable fact that Counsel for Defendants filed to confer with Counsel for Complainants before filing the motion. It is passing strange that Complainants should assert that a single failure by Respondents' counsel to confer merits admonishment when Complainants have thrice violated that requirement without excuse or apology. The reasons for that failure are prior experience and personal considerations affecting timing:

a. When Counsel for Respondents filed this motion, Counsel for Complainants had still not replied to the undersigned's attempt to confer regarding the original motion to consolidate. Nor had Counsel for Complainants ever agreed before to anything suggested by Respondents. In those circumstances, Counsel for Respondents deemed any attempt to confer futile, especially in light of the personal timing issues noted next.

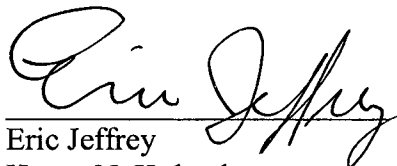
b Respondents' original motion to supplement was filed late Friday afternoon, without benefit of an Affirmation. Since then and until about mid-day Tuesday, the undersigned was out of state dealing with issues relating to his ailing father and the nursing home at which he currently resides. During that period, the Affirmation of Mr. Werner was received. Respondents' Counsel had a very short time window in which to file this addendum to the prior motion, as he had unchangeable meetings with clients who came in from overseas the rest of that day and evening, and equally unchangeable meetings with the FMC Commissioners and senior staff for much of the next day. Accordingly, the undersigned decided to send the pleading

without pressing Counsel for Respondents for an immediate response that he would later claim was made in bad faith.⁴

CONCLUSION

In sum, Complainants' motion for admonishment is wholly unsupported by fact or law, even apart from being made in clear contravention of the FMC Rules.

Respectfully submitted,



Eric Jeffrey
Harini N Kidambi
Nixon Peabody LLP
799 9th Street, N W., Suite 500
Washington, D C 20001
202-585-8000

⁴ The undersigned also corrects two patently false statements in Complainants' first (6 04 p.m.) response. Complainants assert that "Respondents' counsel acknowledge that the time period provided was inadequate." As demonstrated in Attachment B, the undersigned did no such thing. Complainants continue their calumny by asserting: "Respondents' counsel has engaged in unduly familiar and informal communications with the Commission, blatantly trading on Respondents' counsel's familiarity with the Commission and its staff." As per usual, Complainants simply state their mistruth with no support or even citation to a single specific instance. While the undersigned is indeed familiar with a substantial portion of the Commission, he has never traded on that familiarity in any adjudicatory proceeding, and it is an insult not just to the undersigned, but more importantly to the Commissioners and staff, to suggest that they would give the undersigned any special treatment in such a proceeding.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document via electronic and first-class mail to the following:

Marcus A. Nussbaum, Esq
P O Box 245599
Brooklyn, NY 11224
Marcus.nussbaum@gmail.com

Seth M. Katz, Esq
P O Box 245599
Brooklyn, NY 11224

Dated at Washington, DC, this 13th day of May, 2016


Eric Jeffrey
Counsel for Respondents

Attachment A

Jeffrey, Eric

From: Jon Werner <jwerner@lyons-flood.com>
Sent: Wednesday, May 11, 2016 1:11 PM
To: Michael Hitrinov; Jeffrey, Eric
Subject: Fwd: Empire United Lines Co., Inc. v Baltic Auto Shipping, Inc., 15 Civ 355 (CCC) (MF)
Attachments: Letter.5.11.16_Werner.pdf

----- Forwarded message -----

From "Marcus Nussbaum" <marcus.nussbaum@gmail.com>
Date May 11, 2016 10:05 AM
Subject: Empire United Lines Co., Inc. v Baltic Auto Shipping, Inc., 15 Civ 355 (CCC) (MF)
To "Jon Werner" <jwerner@lyons-flood.com>
Cc: "Dennis M. Cavanaugh" <dcavanaugh@mdmc-law.com>

Mr. Werner,

Attached please find a letter to your attention sent under separate cover in response to your email of this date.

Regards,

Marcus A. Nussbaum, Esq
P O Box 245599
Brooklyn, NY 11224
Tel [888-426-4370](tel:888-426-4370)
Fax [347-572-0439](tel:347-572-0439)
<http://www.nussbaumlawfirm.com/>

This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is confidential and may be subject to attorney client privilege. If the reader of this message is not the intended recipient, any dissemination, distribution or copying of this communication is prohibited. If you received this message in error, please delete and/or notify the sender by return e-mail. Although our company attempts to sweep e-mail and attachments for viruses, it does not guarantee that either are virus-free and accepts no liability for any damage sustained as a result of viruses. Thank you.

IRS Circular 230 Disclosure To ensure compliance with U S Treasury regulations we inform you that any U S tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code, or (11) promoting, marketing or recommending to another party any matters addressed herein.

MARCUS A. NUSSBAUM, ESQ.

Mail Drop P O Box 245599, Brooklyn, NY 11224

Tel 888-426-4370 | Fax 347-572-0439

Email marcus.nussbaum@gmail.com

Web www.nussbaumlawfirm.com

May 11, 2016

Via Electronic Mail and First Class Mail

Lyons & Flood LLP

Attn Mr Jon Werner, Esq

One Exchange Plaza

55 Broadway, Suite 1501

New York, NY 10006

Re *Empire United Lines Co, Inc et al v Baltic Auto Shipping, Inc. et al.*
U S D C – D N.J., 15 Civ 355 (CCC) (MF)

Dear Mr Werner,

I am in receipt of your email of this date with regard to an unrelated matter now pending before the FMC, to wit: *Igor Ovchinnikov, et al, v Michael Hitrinov a/k/a Michael Khitrinov, et al* (FMC Docket 15-11)

In the first instance, we note that you and your firm *do not* represent either Empire United Lines Co Inc or Mr Hitrinov in this unrelated matter. Accordingly, your oblique reference to Mr Hitrinov as your 'client' is a misnomer.

Secondly, your conduit of information, whatever it may be, is *erroneous* in that *at no time* has the undersigned used the word 'settlement' with respect to the now discontinued case of Empire United Lines Co Inc v Baltic Auto Shipping Inc et al. Rather, the carefully chosen language was that which the parties agreed to in the resolution thereof, to wit. 'this matter has been *resolved* to the mutual satisfaction of the parties'. Certainly, neither the foregoing nor the mere use of the word agreement in *any* way violates the confidentiality provision of said resolution.

Third, and despite your fruitless attempt to conflate these two unrelated matters, the only representations made in the FMC case with respect to said postal investigation was that the respondents therein and their counsel, despite their having solicited your Affirmation regarding same, abjectly *failed* to establish any nexus between said postal inspection and the FMC case. Further, and notwithstanding that said postal investigation does not, upon information and belief, relate to Baltic in any way, shape, form, or manner, pursuant to the confidentiality provision of the now discontinued action, all parties are precluded from disclosing or discussing any aspect of the resolution thereof, inclusive of negotiations leading up to said resolution which included discussions of said postal investigation, a provision which you personally have apparently violated through the information you disclosed in the affirmation you have provided in the FMC case.

In response to your request, and in an effort to forestall and effectively cut off any further frivolous litigation that you or your office may initiate, you are advised that the said postal investigation does not involve, nor is said investigation related to Baltic Auto Shipping Inc. Consequently, the issue of your stated intention to rescind the resolution reached is now moot.

In closing, you are again cautioned as and against the use of the word 'settlement' in any emails, Court documents, letters, or other affirmations that you may author in any existing case or any future case, as your continued use of this term constitutes a further blatant violation of the

Re: *Empire United Lines Co, Inc et al v Baltic Auto Shipping, Inc et al.*
U S D C – D N.J., 15 Civ 355 (CCC) (MF)

May 11, 2016
Page 2 of 2

confidentiality provision of said resolution. We trust this puts an end to all discussion and any remaining issues regarding said postal investigation to the extent it involves you or your clients relating to the now discontinued lawsuit.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Marcus A. Nussbaum', written over a horizontal line.

Marcus A. Nussbaum, Esq

cc Seth M. Katz, Esq., *Pro Hac Vice* Of-Counsel

Jeffrey, Eric

From: Jon Werner <jwerner@lyons-flood.com>
Sent: Wednesday, May 11, 2016 1:27 PM
To: Michael Hitrinov; Jeffrey, Eric
Subject: Fwd: Re: Empire United Lines Co., Inc. v Baltic Auto Shipping, Inc., 15 Civ 355 (CCC) (MF)

----- Forwarded message -----

From: "Jon Werner" <jwerner@lyons-flood.com>
Date: May 11, 2016 10:27 AM
Subject: Re: Empire United Lines Co., Inc. v Baltic Auto Shipping, Inc., 15 Civ 355 (CCC) (MF)
To: "Marcus Nussbaum" <marcus.nussbaum@gmail.com>
Cc: "Dennis M. Cavanaugh" <dcavanaugh@mdmc-law.com>

Mr Nussbaum,

Thank for your written confirmation that the postal investigation is not related to Baltic. I have passed same to Empire's counsel in the new FMC matters so that they can clarify for the Administrative Law Judge that notwithstanding your statements in the papers filed recently by you, there is no connection between the postal investigation and Baltic.

For your guidance there is no prohibition on the use of the word settlement or disclosure of the mere fact of a settlement between the parties. Instead it is merely the terms of the settlement that are protected by the confidentiality provision.

Moreover, since as you have now confirmed in writing that the postal investigation has no relation to Baltic, the fact that the existence of the investigation was disclosed during a conference at which the details of the settlement agreement were discussed does not cause the fact of the investigation to become protected by some sort of privilege.

Regards,

Jon Werner

On May 11, 2016 10:05 AM, "Marcus Nussbaum" <marcus.nussbaum@gmail.com> wrote:
Mr Werner,

Attached please find a letter to your attention sent under separate cover in response to your email of this date.

Regards,

Marcus A. Nussbaum, Esq
P O Box 245599
Brooklyn, NY 11224

Tel 888-426-4370
Fax. 347-572-0439
<http://www.nussbaumlawfirm.com/>

This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is confidential and may be subject to attorney client privilege. If the reader of this message is not the intended recipient, any dissemination, distribution or copying of this communication is prohibited. If you received this message in error, please delete and/or notify the sender by return e-mail. Although our company attempts to sweep e-mail and attachments for viruses, it does not guarantee that either are virus-free and accepts no liability for any damage sustained as a result of viruses. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with U S Treasury regulations we inform you that any U S tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any matters addressed herein.

Attachment B

Jeffrey, Eric

From: Jeffrey, Eric
Sent: Friday, May 06, 2016 12:55 PM
To: 'Marcus Nussbaum'
Cc: Kidambi, Harini
Subject: Consent

Dear Mr Nussbaum

Specially-Appearing Respondents are planning to file a motion for leave to supplement their Response to the Order to Show Cause in order to reflect that two packages from you to Respondents were returned unopened. As a result of my personal schedule, I need to file around 5 pm, and apologize if you cannot respond by then.

Best regards,

Eric



Eric C Jeffrey

Counsel

ejeffrey@nixonpeabody.com

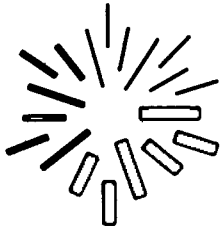
T 202-585-8215 | C 703-919-3374 | F 855-782-6662

Nixon Peabody LLP | 799 9th Street NW | Suite 500 | Washington, DC 20001-4501

nixonpeabody.com | [@NixonPeabodyLLP](https://twitter.com/NixonPeabodyLLP)

Please consider the environment before printing this email.

This email message and any attachments are confidential and may be protected by the attorney/client or other applicable privileges. The information is intended to be conveyed only to the designated recipient(s) of the message. If you are not an intended recipient, please notify the sender immediately and delete the message from your email system. Unauthorized use, dissemination, distribution or reproduction of this message by other than the intended recipient is strictly prohibited and may be unlawful. Thank you.



**NIXON
PEABODY**

RECEIVED

MAY 17 PM 2:44

OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

**NIXON PEABODY LLP
ATTORNEYS AT LAW**

**NIXONPEABODY.COM
@NIXONPEABODYLLP**

Eric C Jeffrey
Counsel
ejeffrey@nixonpeabody.com

Nixon Peabody LLP
799 9th Street NW
Suite 500
Washington, DC 20001-4501
202-585-8000

May 13, 2016

VIA FIRST CLASS MAIL

The Hon Karen V Gregory
Secretary of Federal Maritime Commission
800 North Capitol St.
Room 1046
Washington, D C 20573

Re Docket No. 15-11 – Ovchinnikov v. Hitrinov


Dear Ms Gregory:

Enclosed for filing in the above-captioned matter are an original true copy and five (5) additional copies of:

- 1 Respondents' Response to Complainants' Motion for Admonishment.

Please contact me if you have any questions

Sincerely,


Eric C Jeffrey

Enclosures